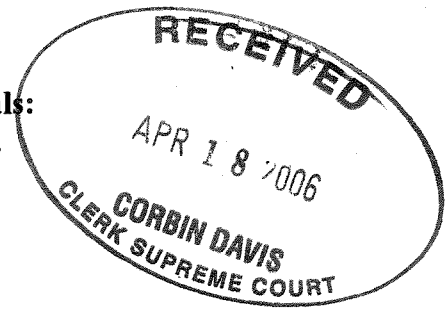
STATE OF MICHIGAN
IN THE SUPREME COURT



Appeal from the Michigan Court of Appeals:
Cooper, P.J., Fort Hood and Borello, JJ.

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

No. 130245

vs.

RANDY R. SMITH
Defendant-Appellee.

Lower Court No. 2003-193910-FC
COA No. 256066

130245

BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN

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Statement of Question Presented

I.

When an offense is not formally divided into various degrees by the legislature, the subset of the elements test supplies the rule for determining when an offense is a degree of the charged offense "inferior to that charged." Manslaughter under MCL § 750.329 is not expressly an inferior degree of murder, nor is it a subset of the elements of that offense. Did the Court of Appeals err in finding that because manslaughter under MCL § 750.321 is a subset of the elements of murder then manslaughter under MCL § 750.329 must also be as well?

Amicus answers: "YES"

Statement of Facts

Amicus concurs with the facts as stated by the People of the State of Michigan, appellant and cross-appellee in this case.

Argument

I.

When an offense is not formally divided into various degrees by the legislature, the subset of the elements test supplies the rule for determining when an offense is a degree of the charged offense "inferior to that charged." Manslaughter under MCL § 750.329 is not expressly an inferior degree of murder, nor is it a subset of the elements of that offense. The Court of Appeals erred in finding that because manslaughter under MCL § 750.321 is a subset of the elements of murder then manslaughter under MCL § 750.329 must also be as well.

A. The Opinion of the Court of Appeals

Defendant was convicted of second-degree murder. Simply put, defendant pointed a gun at the victim's head, told her to repeat "Say I won't do it," and then shot her. He then tried to persuade those present to say that the victim had shot herself. The jury was instructed on manslaughter under MCL 750.321, the theory being gross negligence, but the trial judge declined to instruct on what is often called "statutory manslaughter" under MCL 750.329, which provides that the discharge of a firearm that is "pointed or aimed intentionally but without malice at another person" constitutes the crime of manslaughter where death results. The Court of Appeals found that since this court has held in the *Mendoza*[1] case that manslaughter under MCL § 750.321 in both its forms—voluntary and involuntary—is included within the offense of murder, somehow manslaughter under MCL § 750.329 must be also, the court saying that the act prohibited—the intentional aiming of a firearm resulting

[1] *People v Mendoza*, 468 Mich 527 (2003).

in an unintentional death—"falls within the general category of involuntary manslaughter."[2] The court made no attempt to ascertain whether the elements of MCL § 750.329 are a subset of the elements of murder, remarking instead that "*Mendoza* appears to contradict *Cornell*; however, we are bound by these rulings of the Supreme Court and are not permitted to question their apparent inconsistency."[3] The court also did not explain how this "error" could possibly have been harmful, given that the jury was instructed on and *rejected* "gross negligence" involuntary manslaughter under MCL § 750.321, which requires that the prosecutor shoulder a *greater* burden than required to prove MCL § 750.329, as the prosecutor must show not only that, as a matter of fact in the particular case, a firearm was intentionally pointed, but that this act was one constituting gross negligence, a showing *not* required for conviction under MCL § 750.329.

B. The Errors of the Court of Appeals

The Court of Appeals misunderstanding of both *Mendoza* and *Cornell* in this case is almost startling. There is no "conflict" between *Cornell* and *Mendoza*, and MCL § 750.329 plainly contains an element not contained in the offense of murder (it requires the use of a firearm).

(1) The Court of Appeals Invention of a Conflict Between *Mendoza* and *Cornell*

Amicus is nonplused by the statements of the Court of Appeals panel here that there is an "apparent inconsistency" and "conflict" between this court's decisions in *Mendoza* and *Cornell*.[4] The latter decision holds that, at least where the legislature has not formally divided an offense into

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[2] Slip opinion, at 6.

[3] Slip opinion, at 7. The supposed "conflict" and "apparent inconsistency" were never explained.

[4] *People v Cornell*, 466 Mich 335 (2002).

degrees,[5] one offense is an "inferior degree" of another offense under MCL § 768.32 if that offense is a subset of the elements of the greater offense. In other words, the lesser offense must contain some, but not all, of the elements of the greater offense, *but no additional elements*. *Mendoza* in no way conflicts with this test in its finding that both voluntary and involuntary manslaughter are subsets of the elements of murder.

Both murder under MCL § 750.316 and MCL § 750.317, and manslaughter under MCL § 750.321, are offenses in which the legislature employed a common-law term without alteration, thereby enacting the common-law definitions into the statute.[6] The matter is complicated because of the historical development of the offenses. Manslaughter in its common-law forms appears to the layman to have an element not contained in murder, in that it is a killing "without malice." But there are no negative elements, and neither "adequate provocation," evidence of which will allow an instruction on the voluntary form of manslaughter, nor "gross negligence," evidence of which will allow an instruction on the involuntary form of manslaughter, are elements *additional* to those required for murder. The former simply negates malice because the very definition of malice includes that the killing not be "under circumstances which mitigate the offense to manslaughter,"[7] while the latter negates it by being a lesser mental state than wanton and wilful disregard, a lesser

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[5] Whether the *Cornell* test is necessary where the legislature *has* formally divided an offense into degrees is before this court presently. See *People v Apgar*, 264 Mich App 321 (2004), leave granted __Mich__ (3-31-2006).

[6] See, as one example on this point, *People v Riddle*, 467 Mich 116 (2002).

[7] "Significantly, provocation is not an element of voluntary manslaughter.... Rather, provocation is the circumstance that negates the presence of malice." *Mendoza*, at 536.

mental state being included within a greater or higher. The *Mendoza* opinion renders the development of the law of homicide pellucid, reaffirms that "[a] necessarily lesser included offense is an offense whose elements are completely subsumed in the greater offense,"[8] and concludes that "the elements of voluntary manslaughter are included in murder, with murder possessing the single additional element of malice,"[9] and that "[r]egarding involuntary manslaughter, the lack of malice is evidenced by involuntary manslaughter's diminished mens rea, which is included in murder's greater mens rea."[10] That there is no conflict, then, between *Cornell* and *Mendoza* could not be plainer.[11] The statements of the panel of the Court of Appeals to the contrary here, and which color its decision, are inexplicable.

(2) The Court of Appeals Failure to Apply the *Cornell* Test

The test to be applied under *Cornell* here, then, is whether the offense described in MCL § 750.329 is a subset of the elements of murder. But the panel did not apply the *Cornell* test, simply concluding that the "particular act" charged when MCL § 750.329 is charged of intentionally aiming a firearm, resulting in a discharge causing death "falls within the general category of involuntary manslaughter." But this is a fact-based not an elements-based view of the matter, and *Cornell* requires an elements-based analysis of the two offenses. Even the panel here remarked that an offense is not included within another under *Cornell* if it is what was formerly known as a "cognate"

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[8] *Mendoza*, at 540.

[9] *Mendoza*, at 540.

[10] *Mendoza*, at 540-541.

[11] "Accordingly, we hold the elements of voluntary and involuntary manslaughter are included in the elements of murder." *Mendoza*, at 541.

offense—one containing "some elements distinct from the greater offense."[12] To determine whether manslaughter under MCL 750.329 is included within the offense of murder under *Cornell*, then, one has only to ask whether the former contains an element or elements not included within the latter, a task not undertaken by the panel in this case, and the answer is unquestionably that it does.

Neither murder, nor involuntary manslaughter under MCL § 750.321, contain any elemental requirement that a firearm be used, aimed, or discharged. Murder may be committed without any weapon at all, let alone a firearm. As the panel here itself recognized, manslaughter under MCL § 750.329 requires not only a weapon, but that the weapon be a firearm, that it be pointed at the victim, that the pointing be intentional, that the firearm discharge, and that the victim died as a result of the discharge.[13] Just as felonious assault cannot be an included offense of either assault with intent to murder or assault with intent to do great bodily harm because of the requirement of a dangerous weapon for felonious assault, an element absent from the greater offenses,[14] so here manslaughter under MCL § 750.329 cannot be included within murder. The matter is rather straightforward.

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[12] Slip opinion, at 4-5.

[13] Slip opinion, at 6-7, fn 37, citing CJI 2nd 16.11.

[14] See *People v Vinson,* 93 Mich App 483 (1979), cited in the unpublished opinion of *People v. Velez,* 2005 WL 839630, 3 (2005).

C. Even if the Refusal to Instruct On MCL 750.329 Was Error, No Prejudice Could Possibly Have Accrued

Even for preserved error, reversal is not permissible unless the defendant demonstrates that "after an examination of the entire cause, it ... affirmatively appear[s] that it is more probable than not that the error was outcome determinative."[15] Here, the jury was instructed on manslaughter under MCL § 750.321. This required that the prosecution prove that the act of the defendant—the pointing of a firearm at the victim, the discharge of which caused her death—was a grossly negligent act. And the jury was instructed on gross negligence.[16] In order to prove manslaughter under MCL § 750.329 the prosecution has a lighter burden. The legislature has determined that if the act the statute prohibits—intentionally aiming a firearm at another person—is committed, and the firearm discharges and causes death, that offense is a 15-year felony, a manslaughter, *with proof that the act was grossly negligent not required.*[17] If, faced with a choice between an offense requiring at least a showing of wanton and wilful disregard in the pointing and firing of the firearm and one requiring a showing of gross negligence in the pointing and firing of the firearm, the jury chose the former, that it did not have the option of choosing an offense where only the pointing had to be shown, but no negligence at all, cannot possibly have been harmful to the defendant .

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[15] *People v. Lukity,* 460 Mich 484, 496 (1999). See MCL § 769.26.

[16] See slip opinion, fn 28, quoting the instruction.

[17] It is sometimes said in this situation that the legislature has determined that intentionally pointing a firearm at another person is "gross negligence as a matter of law." But this is not correct. The legislature may well have determined that this conduct is sufficiently grievous as to permit punishment in the same manner as gross-negligence manslaughter, but the fact remains that gross negligence is simply not an element—the legislature has chosen, as a matter of policy, to criminalize a particular act, resulting in a particular consequence, without regard to proof of gross negligence.

D. Conclusion

In answer, then, to the questions posed by this court in its grant of leave to appeal:

- Statutory manslaughter under MCL 750.329 is not an offense included within the crime of murder;

- it thus matters not whether the evidence would have supported a conviction under MCL § 750.329; but

- if MCL § 750.329 were somehow considered to be included within murder, given that manslaughter on a theory of gross negligence under MCL § 750.321 was given the jury and rejected, defendant cannot meet his burden of showing prejudice.

Relief

Wherefore, amicus submits that the Court of Appeals should be reversed and the convictions reinstated.

Respectfully submitted,

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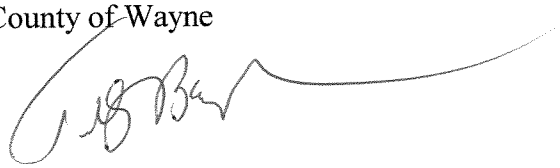

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PROOF OF SERVICE

STATE OF MICHIGAN)
COUNTY OF WAYNE) SS

The undersigned deponent, being duly sworn, deposes and says that [he/she] served a true copy of **Brief of Prosecuting Attorneys Ass. Of Michigan as Amicus Curiae in Support of the People of the State of Michigan**

upon: Thomas Grden, Robin M. Lerg

the above named attorney for defendant, by /__/ PERSONAL SERVICE or by /X/ DEPOSITING SAID PLEADING IN THE U.S. MAIL IN THE CITY OF DETROIT, ENCLOSED IN AN ENVELOPE BEARING POSTAGE FULLY PREPAID, on **April 17 , 2006**, plainly addressed as follows:

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Joycelyn Sharp

said pleading was filed in the SUPREME COURT, by /__/PONY EXPRESS, /__/ Next Day Service or /___/PERSONAL SERVICE at the following address:

CORBIN R. DAVIS, Clerk
Michigan Supreme Court
2nd Floor , Law Building
925 Ottawa Street
Lansing, Michigan 48909

Subscribed and sworn to before me
this 17th day of **April, 2006.**

Notary Public, Wayne County, Michigan
My commission expires: 01-23-09